Nos. 11,320 and 11,321

United States Circuit Court of Appeals

For the Ninth Circuit

POPE & TALBOT, INC., a corporation,
Appellant,

vs.

GUERNSEY-WESTBROOK COMPANY,
a corporation,
Appellee.

POPE & TALBOT, INC., a corporation,
Appellant,

vs.

BLANCHARD LUMBER COMPANY OF
SEATTLE, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF

LILLICK, GEARY, OLSON & CHARLES
IRA S. LILLICK
GILBERT C. WHEAT
EDWARD D. RANSOM
311 California Street,
San Francisco 4, California,
Attorneys and Proctors for Appellant.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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JURISDICTION

This appeal relates to two suits, one in admiralty and one at law.

The libel in the admiralty action (Case No. 11321) (A2) was filed by Appellee Blanchard Lumber Company, and is based upon maritime contracts (bills of lading).

The complaint in the civil action (Case No. 11320) (T. 2) was filed by Appellee Guernsey-Westbrook Company, and is based upon a contract of sale and upon bills of lading. Said complaint alleges that Appellee is organized and existing under the laws of the State of Connecticut, that Appellant is organized and existing under the laws of the State of California, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

The statutory provisions sustaining the jurisdiction of the District Court are:

Judicial Code, Sec. 24 (28 U.S.C.A. Sec. 41(3));
Judicial Code, Sec. 24 (28 U.S.C.A. Sec. 41(1)).

The jurisdiction in this court to review the final decree in admiralty and the judgment at law rests upon *Judicial Code,* Sec. 128 (28 U.S.C.A. 255).

STATEMENT OF THE CASE

In December, 1941, the Lumber Division of Appellant sold to Appellee Guernsey-Westbrook Company approximately 664,991 board feet of Douglas Fir lumber (T. 21), and sold approximately 270,170 board feet of the same type of lumber to Appellee Blanchard Lumber Company (A. 25).

The contract of sale to Guernsey-Westbrook Company consisted of orders by the purchaser (Exhibit 4 to pretrial stipulation in case No. 11320—See Stipulation as to Original Exhibits on Appeal, T. 139) and acceptances

by the seller (Exhibit 5 to pre-trial stipulation) subsequently memorialized by invoices (Exhibit 2 to pre-trial stipulation). The sale was C.I.F. Brooklyn. The method of payment of the agreed purchase price was stated in the documents as:

> "Terms: Ocean Freight Net Cash on arrival of steamer; balance 98% Sight Draft with Documents attached including negotiable bill of lading to order of Marine Midland Trust Co. of New York."

Appellant's Lumber Division, acting as agent for the buyer (T. 134, 135) arranged transportation on the SS ABSAROKA with the McCormick Steamship Company Division of Appellant from St. Helens, Oregon, to Brooklyn, New York, on collect freight bills of lading which named the Lumber Division as shipper, Marine Midland Trust Co. of New York as consignee, with directions to notify Guernsey-Westbrook Company (Exhibit 1 to pre-trial stipulation, Case No. 11320).

The contract of sale between Appellant's Lumber Division and Appellee Blanchard Lumber Company was F.A.S. St. Helens, Oregon (Exhibit 2 to pre-trial stipulation in Case No. 11321; A. 66). Transportation on the SS Absaroka to Philadelphia, Pa., was arranged with the McCormick Steamship Company Division on collect freight bills of lading naming Blanchard Lumber Co. shipper and consignee (Exhibit 1 to pre-trial stipulation in case No. 11321).

The bills of lading for all shipments contained an earned-freight clause whereby the freight was deemed earned at any stage, whether goods or vessel lost or not lost (T. 11, 39; A. 14).

Appellees' lumber was loaded to the steamship Absaroka on or about December 13, 1941 (T.24-A.26). The SS Absaroka sailed from St. Helens, Oregon, December 18, 1941, bound for east coast ports via the Panama Canal (T.24-A.26). The first knowledge of the presence of Japanese submarines on the Pacific Coast was conveyed to the vessel by wireless on December 20 (T.26-A.28). On December 24, 1941, when approximately 5 miles off Point Fermin, Calif., she was struck on her starboard quarter between the No. 4 and 5 holds by a torpedo from a Japanese submarine. The explosion blew off a portion of the after deck load and tore a hole approximately 15 by 20 feet in the shell of the ship (T.24-A.27; Exhibits 1(a) to 1(g)).

The Absaroka was towed into Los Angeles harbor and beached (T. 91). The lumber cargo, a part of which had been oil-soaked and a part soaked by sea water (T. 97), was discharged by January 7, 1942, and the vessel placed on dry dock for examination January 19, 1942 (T. 25-A.27). A repair contract was made with Bethlehem Steel Company January 22, 1942, with the express understanding that all ship repair would be based on priorities and that the shipyard might at any time suspend work on the SS Absaroka for work considered more urgent in the war effort (T. 94). The repairs were not completed until May 9, 1942, more than 5 months after the torpedoing (T. 25, 94-A.25). The total cost of repairs was $326,921.30, exclusive of salvage charges (T. 26-A.29).

On February 5, 1942, after taking into account the impossibility of predicting the approximate time repairs might be completed (T. 95, 102), the existing and pros-

pective increase in submarine activity on the Pacific Coast, the Gulf and Caribbean area and Atlantic Coast (T. 100, 101), the probability that if repairs were completed the government would either requisition the vessel or direct its movement other than intercoastal for the duration of the war (T. 100), the deterioration of lumber and increased storage costs resulting from the oil and salt water absorbed by the cargo (T. 96, 99) and other factors to be subsequently discussed, Appellant's McCormick Steamship Company Division notified Appellee of its intention to abandon the voyage, reserving its right against freight under the bill of lading (T. 26-A. 29). Appellees protested the abandonment (T. 26-A. 29). Pursuant to agreement, the lumber was sold by Appellant, who retained the freight from the proceeds.

An action at law based on the contract of sale and the bill of lading was brought in the District Court by Appellee Guernsey-Westbrook Company for return of $10,543.85, being the full amount of freight. An admiralty action based on the bills of lading was brought by Appellee Blanchard Lumber Company for return of $4,322.72. The cases were submitted on pre-trial orders (T. 21 to 32-A. 25 to 33), and upon the testimony of three witnesses on behalf of Appellant (T. 73 to 136). In the law action, judgment was granted in the amount prayed for. The decree in the admiralty action was in the amount asked, except that $26.59, the value of the libelant's lumber which was destroyed, was deducted. The cases were consolidated by stipulation and order for purposes of printing the record on appeal and briefing (T. 138-A. 65). The memorandum opinion and order

for judgment (T. 31 to 48) and the testimony at the consolidated trial (T. 73 to 136) are printed in the Transcript of Record in case No. 11320, but are not printed in the Apostles on Appeal in case No. 11321.

THE QUESTIONS INVOLVED IN THE APPEAL

There are two issues to be determined on this appeal. The first concerns only the action at law, case No. 11320. The Appellee in that case contends that the orders, acceptances, and bills of lading constitute in effect one contract of affreightment; that the provision "Ocean freight net cash on arrival of steamer" makes delivery of the lumber a condition to payment of freight, and, being in conflict with the earned-freight clause of the bill of lading, controls. Appellant contends that the orders and acceptances constitute a C.I.F. contract of sale between Appellee and Appellant's Lumber Division, by which the buyer became unconditionally obligated to pay the freight. The provision "Ocean freight net cash on arrival of steamer" describes a method of discharging the obligation. The contract of sale was thus not in conflict with the earned freight clause of the contract of affreightment.

As the sale to Appellee, Blanchard Lumber Company, was F.A.S. St. Helens, Oregon, case No. 11321 does not involve the question arising under the terms of the sale.

The second* question which is involved in both cases and is the sole issue in the Admiralty action (Case No.

*The District Court had before it an additional contention of Appellee that the earned-freight clause was optional and Appellant had not exercised the option to make it effective. The District Court determined that the earned-freight clause was not optional but self-executing. This question is not involved in this appeal.

11321) is whether the circumstances were such as to justify Apellant in abandoning the voyage at Los Angeles and retaining the freight under the earned-freight clause.

Both issues were determined in favor of Appellees by the District Court. If the first issue is decided favorable to Appellant on this appeal, Appellant will be entitled under the bill of lading to retain $937.25 in the action at law regardless of the decision on the second issue. This sum represents freight on lumber cargo blown overboard and lost at the time of torpedoing. It is accordingly not involved in the issue of abandonment and would be comparable to the $26.59 granted appellant by the District Court for freight on lumber blown overboard owned by the Appellee Blanchard Lumber Company.

ARGUMENT

The argument in this brief will be divided into two parts. As the first issue, relating to interpretation of the contract of sale, involves only the action at law, No. 11320, in connection with that issue the rules with respect to actions at law will be followed. The second issue on the question of abandonment is pertinent to both the law action and the admiralty action. The argument is identical for each action. An attempt will be made to combine the rules as to law and admiralty in presenting this argument.

PART I

The Contract of Sale unconditionally obligated the buyer to pay the freight and is not in conflict with the earned-freight clause of the bill of lading.

A. Specification of Error:

The District Court erred in finding that the orders and acceptances, together with the bills of lading, constituted a contract of affreightment under which delivery of the lumber at its destination was a necessary condition to be fulfilled before Appellee became obligated to pay the freight (T. 54, 55-Spec. of Errors, I, II, III, IV, V and VI, T. 59, 60).

B. Argument:

There are two contracts involved: (1) a contract of sale between appellant's lumber division as seller and appellee Guernsey-Westbrook Company as buyer, the buyer obligating itself to pay the freight as part of the purchase price irrespective of delivery at destination; and (2) a contract of affreightment between the lumber

division as agent for the buyer and the McCormick Steamship Company Division of Appellant.

The orders of Guernsey-Westbrook Company, the acceptances of the orders by appellant's lumber division, and the invoices all recite that the sale is *C.I.F Brooklyn, N. Y.* (For original sample of these documents, see Exhibits 4, 5, 6 to Pre-trial Stipulation.) The sale price, as in all C.I.F. sales, included cost, insurance, and freight.

In a C.I.F. sale, the freight may be handled in either of two ways: (1) the seller may pay the insurance, prepay the freight and on forwarding the documents, immediately collect from the buyer the full C.I.F. purchase price; or (2) the seller may deduct the cost of the freight from the purchase price in billing the buyer, arrange for insurance and transportation on behalf of the buyer, and thereby relieve himself of any further obligation under the contract, the buyer directly assuming the obligation to pay the freight.

This choice of methods is pointed out by the court in

> *Warner Bros. Co. v. Israel,* 101 F. (2d) 59 at 60, (C.C.A. 2) as follows,
>
> "Under a c.i.f. contract the seller receives a purchase price payable as the parties agree and for that consideration is bound to arrange for the carriage of the goods to their agreed destination, for insurance upon them for the benefit of the buyer, *and either to pay the cost of the carriage and insurance or allow it on the purchase price.* When this has been done the seller *has fully performed* and is entitled to be paid upon delivery of the documents *regardless of whether the goods themselves have arrived at their destination or ever will.*"*

*Emphasis throughout the brief is ours.

See also,

Thames & Mersey M. Ins. Co. v. United States, 237 U.S. 19, 26, 59 L.Ed. 821, 824;

Gamboa, Rodriguez, Rivera & Co. Inc. v. Imperial Sugar Co., 125 F. (2d) 970 (C.C.A. 5);

Madeirense Do Brazil S/A v. Stulman-Emrick Lumber Co. 147 F. (2d) 399 (C.C.A. 2).

These cases support the position that the choice of methods does not change the rule that the buyer, under a C.I.F. contract, not only has the risk of loss of goods in transit (for which insurance is taken out in his name), but also, as between buyer and seller, has the obligation to pay the freight charges irrespective of delivery.

The contract of sale between appellant's lumber division and Guernsey-Westbrook Company adopted the second alternative method of payment under a C.I.F. sales contract. It was a common practice in the lumber trade to enter into C.I.F. sales contracts in which the price included the cost of insurance and freight, but in order that the buyer might have the use of its money during transportation, the freight, which is a substantial part of the cost of lumber to an eastern buyer, would be allowed on, or deducted from, the purchase price, and the seller on behalf of the buyer would arrange transportation with a carrier on collect-freight basis (T. 110, 111, 112, 123). This practice was permitted by appellant's lumber division and arrangements for transportation on behalf of a buyer were made by the lumber division, not only with appellant's McCormick Steamship Company Division, but also with other steamship companies. (T. 14.)

The decision of the District Court that delivery was a necessary condition to the payment by the buyer of the freight charges, which is contrary to the rule in C.I.F. sales, is based upon the provision of the acceptance which reads: "Terms: *ocean freight net cash on arrival of steamer*". The District Court (T. 35 to 39) considered that provision ambiguous in not showing clearly whether the phrase constituted a condition to, or a manner of, payment of freight, but determined the ambiguity in favor of a condition. The court considered the orders, acceptances, and the bill of lading as part of one contract of affreightment, and, using as authority

> *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 48 F. (2d) 850, affirmed 53 F. (2d) 740 (C.C.A. 9), cert. den. 273 U.S. 717, 71 L. Ed. 856.

determined that the above-quoted provision was in conflict with the earned freight clause of the bill of lading and prevailed.

Even accepting the District Court's theory that the orders, acceptances and bills of lading constituted but one contract, the decision is still erroneous. The court was confronted with two provisions in what it termed a single contract. One, the clause in the acceptance, it considers ambiguous. (T. 38.) The other, the earned-freight clause which is favorable to appellant, it determines is clear. (T. 41.) These two provisions, it says, are in conflict, and both may not stand. But the District Court did not resolve the conflict in favor of the clear provision, which supports appellant. *It resolved the conflict in favor of its construction of the ambiguous clause.* Proper con-

struction would require, either that the ambiguity be solved by the clear provision, or that the same result be reached by resolving the conflict between the two provisions against the one which is ambiguous.

The court fell into further error in failing to distinguish between a sales contract and the established rules relative thereto and an affreightment contract. The terms on which the court based its decision that delivery was a condition to payment of freight is the language of the contract by which the parties stated the choice of method of payment under the C.I.F. contract. The words "Terms: ocean freight net cash on arrival of steamer" stated *how,* or the *method* by which, freight which was part of the purchase price was to be paid. The emphasis was not on delivery, but on the terms, the price, the manner of payment. It is established in the law of sales that where the place of delivery is used in connection with price and terms of payment it does not make the delivery a condition to the performance of any obligation in the contract, but merely illustrates either the amount of price or the manner of its payment.

In *Warner Bros. Co. v. Israel,* 101 F. (2d) 59 (C.C.A. 2), sugar was sold on C.I.F. terms, the freight being handled in the same manner as in the contract of sale under consideration. After arranging for transportation and insurance the seller forwarded documents with draft attached for 95% of the purchase price less the freight. While the sugar was in transit between the Philippine Islands and New York, the sugar quota was filled, and the buyer accordingly could not take delivery. The seller sued for the balance of the purchase price.

The buyer defended on the ground that delivery was made a condition to any further obligation on its part citing phrases in the contract comparable to the language under consideration in this appeal; such as a provision for determination of final payment of price on "net delivered weight" and "settlement of each shipment was to be made on final test" and "delivery to be tendered ex vessel at a customary safe wharf or refinery at New York, Philadelphia or Baltimore to be designated by buyers." The Second Circuit Court of Appeals rejected the buyer's contention that such language made delivery a condition to any further obligation by the buyer under the contract, and considered the language as dealing with "an adjustment of the purchase price." After pointing out, in the language previously quoted, the alternative methods under a C.I.F. contract, the Second Circuit Court of Appeals stated:

> "For the moment we will accept the buyer's contention that there was no delivery of the sugar to him at the point of destination and confine the inquiry to whether or not delivery was necessary, not *as a matter of performance by the carrier of its contract, but as a matter of performance by the seller of the contract of sale upon which it has sued.* In order to become entitled to payment of the purchase price under the ordinary C.I.F. contract, of course, such *delivery of the goods would not be a condition precedent to be performed at the risk of the seller. Nor is it made so merely because the obligation to contract for the carriage is expressed in the form of delivery of the goods at a designated place.*
>
> * * *
>
> "Consequently, it must be held that the seller made full performance by shipping the sugar and deliver-

ing the documents as required by the terms of the contract of sale'';

In *Gamboa, Rodriguez, Rivera & Co. Inc. v. Imperial Sugar Co.,* 125 F. (2d) 970 (C.C.A. 5), sugar was sold under a C.I.F. contract of sale. The exact terms of the sales contract are not set out in the opinion but it states:

> "Insurance was procured and invoices were prepared by Gamboa [seller] on each of the shipments and from the invoice price there was deducted the cost of *freight which was to be paid at destination.*"

It may reasonably be presumed, therefore, that the contract provided freight "to be paid at destination," a comparable phrase to "ocean freight net cash on arrival of steamer." The shipments were made on three vessels from the Philippine Islands to Galveston, Texas, but because of the outbreak of the war the vessels, being of German ownership, abandoned the voyage and delivered the sugar at intermediate ports, demanding payment in full for the freight, which was ultimately paid by the buyer. On being sued by both parties, the carrier paid the money into court. (Its bill of lading provisions do not appear.) The seller contended that it was entitled to the refunded freight on the ground that the buyer, in paying it, was acting as agent for the seller. The Fifth Circuit Court of Appeals held, however, that the seller, having delivered the goods to the carrier, was relieved of any further obligations under the contract, including freight obligations, and that, when it shipped the sugar, and forwarded the proper documents to the buyer, its obligations and rights under the contract were

at an end, the buyer from that point on having the risk of the goods and the freight and being accordingly entitled to the refund. The pertinent part of the court's opinion is as follows:

> "Appellant's position will not be sustained. Gamboa has, in fact, realized every cent it expected to receive or to which it was entitled under the contract. It has been paid for the sugar and the insurance, *and has been relieved of its freight obligations. When it shipped the sugar, and forwarded the proper documents to Imperial, its obligations under the contract were at an end. From that moment the buyer alone stood to lose on the ventures.*"

The following decisions, while not involving contracts on C.I.F. terms, serve to illustrate that in the law of sales, where delivery is mentioned in conjunction with the terms of price, it refers to the amount of or method of payment of price and is not a condition to the obligation *to pay* the price or to the passing of title or to other performance.

In *Boston Iron & Metal Co. v. Rosenthal,* 68 Cal. App. (2d) 564, 156 P. (2d) 963, the court had under consideration a C. & F. contract which provided:

> "Price: $30 per gross ton *delivered Japan.* Shipment: during month of May, June, July, August, 1937. Terms: all payments to be cash. * * * Accepted: C. & F. Japan accepted ports."

It was contended that under these terms, contrary to the general rule of C. & F. contracts, buyer was not obligated to pay the price until actual delivery. The question, as stated in the opinion, was "whether plaintiff was obligated to pay for merchandise 'delivered

Japan' only." The court held the words "delivered Japan" did not create a condition requiring seller to actually deliver the goods in Japan but that the seller completed the obligation on delivery to the carrier.

The court said, in reference to the phrase "deliver Japan":

> "The trial court was undoubtedly satisfied, as we are, that the words in that collocation were used to refer to and qualify price, and not to indicate the point of delivery or where title was to pass."

In *Myer v. Sullivan,* 40 Cal. App. 723, 181 P. 847, the contract stated:

> "1.43 1/3 per 100 lbs. f.o.b. Kosmos Steamer at Seattle."

No "Kosmos Steamer" was available at Seattle and the seller cancelled the order on the ground that he could not make delivery in accordance with the contract. The court held that the above-quoted phrase did not indicate the condition or place of delivery, but referred to the manner in which the price was determined. The court said, on page 730:

> "The general rule seems to be that if the agreement is to sell goods f.o.b. at a designated place, such place will ordinarily be regarded as the place of delivery; but the effect of the f.o.b. depends on the connection in which it is used and if used in connection with the words fixing the price only, it will not be construed as fixing the place of delivery."

In *Goodyear Tire & Rubber Co. v. Northern Insurance Co.,* 92 F. (2d) 70 (C.C.A. 2), the sales contract provided:

> "Terms: Net cash 30 days from date of delivery at New York City f.o.b. cars New York City."

Before they could be placed on cars, the goods were destroyed. It was contended that "f.o.b. cars New York City" was not only a condition of delivery, but that title did not pass until the goods were actually placed on the cars. The court said:

> "In the case at bar New York City was specified as the 'Place of Delivery', and the f.o.b. provision was not put under that caption, where one would naturally expect to find it if it were intended to indicate the point at which delivery was to be complete. Instead, the f.o.b. provision was placed under the heading 'Terms,' where it would seem to have relation to price and to indicate that the cost of loading on cars was to be borne by the seller."

A similar line of reasoning was used by the court in *Pond Creek Mill and Elevator Co. v. Clark,* 270 F. 482 (C.C.A. 7) in holding that the term "Basis Chicago" following a designated price referred to the terms or conditions of sale with respect to price and was not a requirement of delivery.

It is thus apparent that in using the expression "Terms: ocean freight net cash on arrival of steamer: Balance 98% sight draft," etc., appellant's lumber division, as seller, being familiar with the usual rules relating to sales contracts, was describing the manner in which the purchase price under the C.I.F. contract would be arranged. The seller, after obtaining insurance and arranging for the transportation, forwarded the bill of lading, together with the draft for 98% of the purchase price

less freight, and completed its obligation under the contract. As between buyer and seller, the buyer continued to be obligated for the freight which he could take care of by paying cash on arrival of the steamer under the collect bill of lading, but which he was obligated to do in any event.

The District Court, based its findings on the authority of its decision in *Toyo Kisen Kaisha v. W. R. Grace & Co.,* supra, and the affirming decision of this Honorable Court in the same case, relying on that case in two respects: first, to find that the contract between Appellant's lumber division and the buyer made delivery a condition to payment of freight by comparing the phrase used in the *T.K.K.* contract "freight payable in San Francisco on receipt of weights from Honolulu" to the phrase, "ocean freight net cash on arrival of steamer"; secondly, to find that there was but one contract—a contract of affreightment consisting of the typewritten orders and acceptances and the printed bill of lading—and that the language quoted above was in conflict with the earned freight clause and controlled.

W. R. Grace & Co., the seller, arranged with the T.K.K. Line to transport 2500 long tons of nitrate from Chile to Honolulu. The "special freighting agreement" was originally made by telephone and confirmed by letter of January 14, 1921. *The opinion does not indicate what the arrangements were as between seller and buyer—the only arrangements involved are those as between seller and carrier.* The contract provided in part as follows:

> "2,500 long tons Nitrate of Soda March shipment per 'Tokuyo Maru' from Nitrate Port to Honolulu at $7.00 per ton of 2,240 pounds gross weight delivered.

> "Freight payable in San Francisco on receipt of weights from Honolulu."

The same day W. R. Grace & Co. sent a letter to its Chilean agents stating that it had made arrangements for the shipment and the freight rate and that freight was "payable at San Francisco on receipt of weights from Honolulu." The letter gave the following further instruction:

> "In making up bills of lading we would ask you to kindly omit freight therefrom and just let the same carry the clause 'freight as agreed.'"

The cargo was loaded at Chilean ports. The bills of lading carried various marginal notations as freight "to be paid as per margin in destination," "freight as per agreement" or "freight as agreed." The bills of lading contained the usual "freight earned, vessel lost or not lost" clause. The vessel and the cargo were destroyed by fire en route. The carrier sued W. R. Grace & Co., the seller, for the freight. The District Court held that the written agreement constituted the contract of affreightment requiring delivery and receipt of weights at Honolulu before payment of freight and that the bills of lading were merely receipts. The libel was dismissed. This court affirmed the judgment, holding that, while the bill of lading was more than a mere receipt, the entire contract of affreightment, in so far as "freight," was concerned was contained in the letter from seller to carrier confirming oral conversations, and by that letter the *carrier* agreed to be paid its freight on delivered weights. The marginal notations in the bill of lading

were considered to demonstrate that all agreement as to freight was per prior contract with the carrier. The earned freight clause was accordingly held to be omitted by agreement.

This Court said, on page 742:

> "That earlier agreement of January 14, 1921, is perfectly self-consistent and does no violence to the bills of lading provided we exclude from those bills, *as is implied by their marginal directions, questions of freight.*"

and on page 743:

> "The letter of January 14, 1921, constitutes the complete contract of affreightment so far as freight rates and their payment are concerned."

and further on page 744:

> "Without further reciting the evidence we believe that a study of the record leads to the inevitable conclusion as to all matters relating to freight, the oral agreement and the confirmatory letter constituted the contract between the parties in the instant case. The marginal notations on the bills of lading themselves would so indicate."

It is submitted that this decision does not support the District Court's erroneous findings. The case is clearly distinguishable in two major respects:

1. The contract referred to is a contract between seller and carrier. It is a contract of affreightment not a contract of sale. No contract between seller and buyer appears or is referred to in any way. It is assumed without question that seller pays the freight if the freight is payable. In the case under consideration in this appeal, on the other hand, the contract, which is considered

by the District Court as analogous to the contract in the T.K.K. case, is a contract between Appellant's lumber division, as seller, and Appellee, as buyer. It is a contract of *sale*. It could not as to carrier constitute a contract of affreightment with respect to freight or otherwise. The contract in which the carrier is involved is solely the bill of lading. When a contract of *affreightment* uses the terms "freight payable in San Francisco on receipt of weights from Honolulu" it *is* making delivery a condition to paying freight. Such a contract does not deal with "price" as in a sales contract, and, hence, the reference cannot, as in a sales contract, refer to the manner of paying the price.

2. The decision in the *T.K.K.* case, as appears from the above quotations, stresses the marginal notations in the bills of lading that freight is "per agreement" or "as agreed." No such marginal notation appears on the bills of lading in our case. The lack of such marginal notation is further evidence that Pope & Talbot, Lumber Division, was acting as seller and did not consider its contract with the buyer as being a part of the bill-of-lading contract subsequently made on behalf of the buyer with the McCormick Steamship Company Division, as carrier.

Terms in an affreightment contract cannot be used to construe terms in a sales contract. The bill of lading and the sales contract are not in conflict. As Pope & Talbot, acting as seller, performed its obligations under the sales contract, the buyer, thereafter assumed all risks and obligations including the obligation to pay the freight, and, under the earned-freight clause, the carrier is entitled to retain the freight.

ARGUMENT—PART II

There was a commercial frustration which justified the abandonment of the voyage and collection of the freight.

A. Specification of Error:

The District Court erred in failing to consider, in determining the question of frustration, all of the factors confronting appellant at the time of its decision to abandon and in failing to find that there were sufficient facts to constitute commercial frustration and justify appellant's abandoning the voyage and retaining the freight money under the earned freight clause of the bill of lading.

Points VII through XIV, "Statement of Points Upon Which Appellant Intends to Rely on Appeal," T. 60 through 64. (Case 11320.)

Assignment of Errors II, III, IV, XII, XIII, XIV, XVI, (A. 48, 50, 51, 52, 53, 54) (Case 11321). Reprinted in Appendix hereto.

B. Argument:

It is appellant's position that the facts surrounding its decision to abandon the voyage justified the abandonment both under the bill-of-lading provisions and under the general doctrine of commercial frustration the voyage being justifiably abandoned, appellant was entitled to its freight under the earned-freight clause of the bill of lading. The error committed by the District Court was in holding that there was not a commercial frustration of the venture warranting appellant's taking advantage of its earned-freight clause. The validity of the earned-freight clause was upheld.

The essence of the earned-freight clause under consideration is:

> "3. Full freight to destination * * * due and payable * * on receipt of the goods * * and the same * * shall be deemed fully earned and due and payable to the carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost, * * *." (T. 11, 39.)

Such clauses have long been upheld by the Supreme Court and by the Ninth Circuit Court of Appeals:

Allenwilde Transport Corp. v. A. W. Pidwell,
248 U.S. 377, 63 L. Ed. 312;

International Paper Co. v. The Gracie D. Chambers,
248 U. S. 387, 63 L. Ed. 318;

Standard Varnish Works v. The Bris,
248 U.S. 392, 63 L. Ed. 321;

Portland Flouring Mills Co. v. British & F.M. Ins. Co., (C.C.A. 9) 130 Fed. 861.

The widespread use of such a clause in commercial practice was recognized by this Court in

Mitsubishi Shoji Kaisha v. Societe Purfino Maritime (The Laurent Meeus) 133 F. (2d) 552 (C.C.A. 9, 1942)

in stating, on page 558:

> "For over a quarter of a century the majority, if not all, of the larger Steamship Companies have had similar clauses in the hundreds of thousands of bills of lading issued for the ocean carriage of merchan-

dise. They are accepted as normal incidents of sea borne commerce and are one of the factors in determining ocean freights."

Although the bill of lading states that freight shall be deemed earned at any time, there must be some further justification for the carrier to be entitled to freight without delivery of the goods at destination. Paragraph 7 of the bills of lading (Exhibit I attached to pre-trial stipulation in each case) reads, in part, as follows:

> "If because of conditions, actual or reported, at or near or between the port of loading and/or the port of discharge, such as *war, hostilities* * * * blockade * * *or any regulations of any government* * * * *or any condition whether of like nature to those named or otherwise and whether existing or anticipated,* which may cause the Master to decide that it is *unsafe or impracticable to proceed* from or to any port * * * or *that the* loading or discharging or *carriage of the cargo is likely to be delayed* * * * then the vessel may, at its option * * * store the goods ashore * * * at the port of place where the vessel then is * * * all at the risk and expense of the goods, their shipper, owner and consignee. Any such disposition of the goods shall constitute a final delivery thereof, but the Carrier shall retain a lien on the goods for all proper charges * * *."

Appellant concedes that, although this language is sufficiently broad to permit abandonment of the voyage under many circumstances, the action taken under the clause must not be unreasonable, arbitrary or capricious. *The Wildwood,* 133 F. (2d) 765, (CCA 9) at 767.

Such provisions of the bills of lading are implemented by an implied right to abandon under the doctrine of commercial frustration in the general maritime law.

The Kronprinzessin Cecilie, 244 U.S. 12, 61 L. Ed. 960;

Texas Co. v. Hogarth Shipping Co. (CCA 2) 265 Fed. 375, Aff'd 256 U.S. 619, 65 L. Ed. 1123;

The Wildwood, 133 Fed. (2d) 765 (CCA 9).

The frustration depends upon the facts of each case and is to be determined as of the time of abandonment. *The Styria v. Morgan,* 186 U.S. 1, 46 L. Ed. 1027. The intervening event must have been beyond the contemplation of the parties in making the contract.

Admiral Shipping Co., Ltd., v. Weidner, Hopkins & Co., 1 KB 242, 13 Asp. M. C. 246, 249.

Commercial frustration may be the result of a number of events which fall into fairly definite categories. Probably the most frequent grounds of commercial frustration is wartime governmental interference with the venture such as refusal to grant clearance from port, or embargo, or requisition or threat of such measures.

Allenwilde Transportation Corporation v. A. W. Pidwell, 248 U.S. 377, 63 L. Ed. 312;

International Paper Co. v. The Gracie D. Chambers, 248 U.S. 387, 63 L. Ed. 318;

Standard Varnish Works v. The Bris, supra 248 U.S. 392; 63 L. Ed. 321;

The Malcolm Baxter, Jr., 277 U.S. 323, 72 L. Ed. 901;

Robinson on Admiralty, P. 653.

That such interference is not permanent does not militate against a finding of frustration if the duration is unpredictable.

> "The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition,—that is, the submarine menace,—and that as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it." *(Allenwilde Transportation Corporation v. Pidwell, supra).*

Nor is *actual* governmental interference a prerequisite. Reasonable anticipation of such interference will constitute commercial frustration. The rule was stated by Hough, J., in *The Claveresk* (CCA 2), 264 Fed. 276, 282, as follows:

> "In referring to decisions of authoritative reasoning on this whole subject, it must be remembered that a charter party, a bill of lading, a freight contract, and most written agreements affecting ships as vehicles of commerce, are 'mercantile contracts' * * * Bearing this in mind, *The Styria* * * * and *The Kronprinzessin Cecilie* * * * are *modern instances of how apprehension of restraint, something much less than actual governmental compulsion, may suffice to dissolve the obligation of a contract."

Danger or threat of danger beyond that existing or considered at the time of making the contract is another frequent ground of commercial frustration.

The Styria v. Morgan, 186 U.S. 1, 46 L. Ed. 1027;
The Kronprinzessin Cecilie, 244 U.S. 12, 61 L. Ed. 960;
The Wildwood, 133 F. (2d) 765 (CCA 9);
M. A. Quinn Export Co. v. Seebold, 287 Fed. 626 (CCA 5).

While essentially all grounds of frustration, except where the vessel or cargo are actually lost, are in effect based on an indefinite period of delay before the venture may proceed, delay of itself is considered a ground for declaring a venture frustrated. The principle of commercial frustration by delay was enunciated in *Admiral Shipping Co., Ltd., v. Weidner, Hopkins & Co.,* 1 K.B. 242, 13 Asp. M.C. 246 in the following oft-quoted language:

> "The commercial frustration of an aventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfillment of the contract in the only way in which fulfillment is contemplated and practicable is so *inordinately* postponed that its fulfillment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made."

Turning to the facts in the case presented by this appeal, it is difficult to conceive of a set of circumstances which combine in one case as many grounds for commercial frustration of a venture as in the case at bar. In addition to such factors as danger of fire in, and deterioration of, the oil- and sea-water-soaked lumber, and costs of storage, there was direct enemy action, increased hazard and threats of increased dangers from submarine action, reasonable apprehension of government seizure or interference for an indefinite period, unreasonable, unpredictable, inordinate delay in repairing, each of which factors is in itself sufficient to constitute commercial frustration. The combination compels such a finding.

The decision to abandon was made February 5, 1942. As pointed out by this court in *The Wildwood,* supra, in considering the question of increased war hazard as a reason for abandonment, the question is increase "over that existing at the time the agreement to carry was made." The bills of lading were executed December 13, 1941, less than a week after the attack on Pearl Harbor. (T. 23 - A.26.) While appellant, prior to sailing on December 18, 1941, under governmental direction took some precautions such as painting the vessel (T. 89), it and others in private shipping business at that time actually no more anticipated submarine torpedo attacks on the Pacific Coast from an enemy whose home base was 7,000 miles away than did the public conceive of the attack on Pearl Harbor. The voyage contracted for was intercoastal via the Panama Canal, not transoceanic. On December 13, when the affreightment contracts were made, and on December 18, when the vessel sailed, there had

been no hint of enemy submarines in Pacific Coast waters. (T. 100, 25 - A. 22.) There is no indication in the record of any torpedoing of American vessels by that time on the Atlantic coast or in the Gulf and Caribbean. The first indication of the presence of Japanese submarines in Pacific Coast waters was conveyed by wireless to the Absaroka while underway on December 20, 1941. (T. 100, 25 - A. 22.) That information constituted sufficient increase of hazard to have justified the Absaroka in scurrying for the nearest port and declaring the voyage frustrated rather than continuing as she did and suffering a torpedo attack. The hazard, rather than diminishing, continued to increase. By February 5, when the notice of abandonment was sent, there had been a considerable number of sinkings on the Pacific and Atlantic coasts, and the German submarine menace in the Gulf and Caribbean area had reached alarming proportions, particularly brought home to appellant by the loss of its vessel West Ivis (T. 101, 102). No intercoastal voyages were being undertaken (T. 100), and there was no indication of any prospective intercoastal convoying (T. 102). That ultimately the submarine menace was considerably reduced is irrelevant. No one—least of all a private citizen—could, on February 5, 1942, predict any great improvement, nor foretell with any degree of certainty how long the menace would continue. We submit that the risk and hazard of an intercoastal voyage from and after December 20, 1941, and especially as viewed from early in February, 1942, were far greater than that assumed when the bills of lading were issued December 13, 1941, and that appellant could not be re-

quired to undergo such increased risk in the performance of its contract. That this increased hazard is alone sufficient to constitute a frustration of the voyage is demonstrated by the decided cases.

Except for the fact that the increased hazard was possibility of seizure rather than torpedoing (a fact in favor of appellant's position), *The Wildwood,* 133 Fed. (2d) 765, decided by this Honorable Court in 1943, bears a close analogy to the Absaroka. Bills of lading were issued February 20, 1940, for cargo to be carried from Jersey City to Vladivostok, subsequently changed to include Petropavlovsk while the vessel was en route. The shipper and the cargo were Russian; the vessel, American. Both knew when the bills of lading were issued that the British were exercising "Contraband Control" in the Atlantic, having seized over 100 American-owned vessels. Both knew that a Russian vessel, the SELENGO, had been sized by the British the month before off Formosa and taken to Hong Kong, which act this Court described as "partial blockade" in the Pacific waters. "Both the carrier and shipper knew," as the opinion states on p. 767, "when clause 4 (comparable to clause 7 quoted above) was agreed upon, that the New Jersey-Petropavlovsk-Vladivostok voyage was not as free of likelihood of seizure by a belligerent as in peace time." After the Wildwood had sailed from Honolulu, its owners learned for the first time that the British, in asserting "contraband control," had seized a Russian vessel bound on a voyage to the same ports as the Wildwood. The owners instructed the master to bring the ship to Seattle. The cargo was discharged and the voyage terminated. There were no subsequent seizures.

This Court held that, both under the bill of lading and "the general maritime law," the carrier was entitled to abandon the voyage. The apprehension of danger arising from the seizure of the one vessel after the voyage commenced was considered "a far greater war hazard than that contemplated by the parties when the charter was made" and the bills of lading issued.

In *M. A. Quinn Export Co. v. Seebold*, 287 Fed 626 (C.C.A. 5), when the charter was made, the shipowner, a neutral, knew that the cargo to be carried to a belligerent port was contraband and that it might be seized or the vessel destroyed. After the contract was made, Germany announced and commenced to execute a policy of unrestricted submarine warfare. The court considered this sufficient increased hazard to constitute frustration, saying, on page 628:

> "The incidents mentioned were referred to in support of the contention that before the declaration of unrestricted submarine warfare a neutral vessel undertaking such a voyage as the one stipulated for incurred a risk of being sunk by a German submarine or of being condemned by German authorities. Though such risks existed and were in contemplation of the parties when the charter party was entered into it cannot plausibly be denied that the situation of neutral vessels engaged in such voyages as the one provided for by that instrument *was materially changed for the worse* by the operations of German submarines as carried on after the issuance of the proclamation of January 31, 1917." (Emphasis ours.)

In *Kronprinzessin Cecilie*, 244 U.S. 12, 61 L. Ed. 960, bills of lading were issued July 27, 1941, and the German

vessel sailed for England the following day but turned back July 31 on being advised that war was declared by Austria against Servia. The master was apprehensive of war between England and Germany and consequent capture of the vessel in a British port. As it turned out, the probabilities are that the ship would have been able to discharge its cargo at destination and be out of English waters by the time war actually broke out.

The Supreme Court upheld the master's action in abandoning the voyage because of the apprehension that war would be declared. While the court indicated that neither party to the contract thought, on July 27th, that it would not be performed, it is plain that the parties were aware of the existing tense international situation. The change in hazard at the time of the abandonment a few days later was that a state of war existed between two countries not concerned in the adventure.

The increase of hazard over that contemplated by the contract is far less in each of these cases than that confronting the Absaroka when it was decided to abandon the voyage.

At the time of the decision to abandon the voyage, appellant reasonably anticipated either a direct requisition of its vessel by the government or (what would be tantamount to requisition) a direction and control of the vessel's movement requiring her services in more essential routes. (T. 100.) It was common knowledge in this country, particularly in the steamship industry, that at the outbreak of the war there was a dire shortage of ships of all kinds. That any vessel able to float would be required by the government to aid in the prosecution

of the war would appear to have been an accepted fact. That the Absaroka was in fact acquired by the government on completion of repairs, under an arrangement which the District Court in its opinion considered to be in effect a requisition, is relevant in pointing out the reasonableness of appellant's belief (WSA wire, Exhibit 3 to pre-trial order in both cases; T. 25). The authorities previously referred to establish that frustration may result from anticipated governmental interference as well as from actual governmental interference.

The District Court, in its findings and opinion (T. 53, 42-A. 38), states that appellant, in abandoning the voyage, relied primarily on the delay in repairs. While the delay in repairs is emphasized by Mr. Lunny in his testimony, the other factors mentioned and discussed herein must also be given due and proper weight. The question is not what Mr. Lunny emphasized, but what facts were considered in abandoning the voyage. However, even if we were to ignore the other grounds which are sufficient to justify abandonment, the prospect of indefinite delay in effecting repairs, as viewed under the conditions existing on February 5, 1942, is ample basis to support appellant's position.

The vessel was first placed in dry dock for examination on January 18, 1942, and a contract was negotiated with Bethlehem Steel Company under an offer dated January 22, 1942 (T. 25-A. 28). This contract gave appellant no assurance as to when, if ever, the repairs would be accomplished. It was expressly understood that all repair work would be based on priorities, that any time the yard was required to use its labor and materials on

vessels of the Army, Navy or War Shipping Administration, or to perform any work considered more essential to the war effort, the Absaroka would be required to lie idle, and that if the Absaroka occupied a dry dock which was required by a more essential vessel, she would be removed and work on her suspended until the work on the more essential vessel had been completed (T. 94). Considering the common knowledge in this country of the shortage of repair facilities in the early part of the war, and indeed throughout the war, it is plain that these conditions of the contract were no idle jest, and that appellant could not conceivably anticipate the time required to complete the repairs. While the repairs were actually completed in 110 days (T. 93), appellant's officers reasonably thought "it could well be a matter of months and months" (T. 102).

The situation with respect to the delay in repairs is not unlike that presented in *Jackson v. Union Marine Insurance Co.,* 31 L.T. 789, 2 Asp. M.C. 435. A vessel under charter left Liverpool January 2, 1872, for Newport, where she was to load a cargo of rails to be transported to San Francisco She ran aground January 3, 1872, got off February 18, and, although sold without accomplishing repairs, it is estimated that she could have been repaired by July 1. The court, in holding that the venture was frustrated and the owner justified in abandoning the voyage, considered the delay such as would make any resumed voyage an entirely different one from that originally undertaken, stating:

> "The time necessary to get the ship off and repair her so as to be a cargo-carrying vessel was so long as to put an end in a commercial sense to the

> commercial speculation entered into between the shipowner and charterer."

There is every indication in the *Jackson* case that the duration of repairs could be predicted with reasonable certainty, a factor non-existent in the case presented in this appeal.

Lord Finlay, speaking for the House of Lords in *Bank Line, Ltd. v. Arthur Capel and Co.* (H. of L. 1919) A.C. 435; 14 Asp. M.C. 370 at 372, said, in holding a charter frustrated by delay resulting from requisition where the vessel was released from the requisition after five months,

> "A charter for 12 months from April is clearly different from a charter for twelve months from September. In such a case the adventure contemplated by the charter is entirely frustrated * * * the owner is entitled to say that the contract is at an end on the doctrine of frustration of the adventure."

The District Court considered Paragraph 9 of the bill of lading that "Carrier is not and shall not be required to deliver said packages at the port of discharge or port of destination at any particular time, or to meet any particular market, or in time for any particular use" and a similar provision in Section VI(a) of Official West Coast Standard Sales and Shipping Practices (Exhibit 2) as in effect, estopping appellant from urging delay as a grounds for abandonment. (T. 43.) But the delay referred to in these provisions is ordinary and reasonable, such as is occasioned by minor crew or stevedoring troubles, engine breakdowns, storms and the many other matters which are the plague of steamship operators and which may be reasonably contemplated by the par-

ties, *not* the unreasonable, indefinite and inordinate delay with which appellant was actually confronted.

The situation is analagous to that referred to by the Court of Appeal in *Admiralty Shipping Co. v. Weidner,* 13 Asp. M.C. 539, (King Bench Division decision cited above). This case involved a charter for a "Baltic round" (a round trip between England and the Baltic Sea). Baltic ports were blockaded when war broke out. The charterer had the option of cancelling the charter, "in event of Great Britain or other European Powers being involved in war affecting the working of the steamer." Charterer sent notice of cancellation. The shipowner, on the other hand, claimed commercial frustration entitling it to the charter hire. The charterer then contended that the quoted provision precluded frustration under the circumstances. The court held with the shipowner stating that the option clause meant a condition which would only *partially* affect the working of the steamer, but did not contemplate complete impossibility such as resulted from the blockade. The court said, page 548:

> "The construction of the clause is not free from difficulty, but, having regard to the language used, it appears to me not to apply at all in the events which have happened. * * * To speak, therefore, of the charterer's option to take one or other of those courses is to speak of * * * a temporary affecting of the working of the steamer as opposed to something of so serious a character as to prevent any working of the steamer at all for a period sufficient to amount to a frustration of the adventure. Assuming this construction of this clause to be correct, it practically disposes of any argument on the second branch of this question, *because if the parties have deliberately re-*

stricted the expressed provisions of the charter-party to some temporary interruptions by reason of war, *they cannot be assumed to have excluded the implied condition which would come into operation in the event of the more serious interruption taking place.*

For purposes of emphasis we have considered each of the major considerations in abandonment of the voyage of the Absaroka separately, and have shown that each is sufficient to constitute commercial frustration and entitle appellants to the benefits of the earned-freight clause. Considering the combination of circumstances at the time of abandonment, the unpredictale time when the vessel which had been practically destroyed would again be able to sail, the reasonable anticipation that, even when ready, she would be either directly requisitioned or otherwise controlled by the government, the then-known danger and hazards of a voyage through submarine-infested waters without benefit of convoy, together with the more minor, but nevertheless weighty, problems in connection with the lumber cargo, including shortage of labor to handle it, the Coast Guard orders requiring extra guards for fire protection and limiting the height to which the lumber could be piled in the yard, necessitating piling the oil- and sea-water-damaged lumber in such a way as to progressively increase its deterioration (T. 96, 97), without doubt there was a commercial frustration of the venture justifying appellant in abandoning the voyage and retaining the freight from the proceeds of the sale of the lumber pursuant to the earned-freight clause of the bills of lading.

CONCLUSIONS

We respectfully submit that the obligation of Appellee Guernsey-Westbrook Company to pay the freight charges is not conditioned upon delivery of the lumber at destination, and that the sales contract consisting of the orders and acceptances is not in conflict with the earned-freight clause of the bill of lading. The circumstances confronting Appellant were such as to constitute commercial frustration of the adventure, justifying abandoning the voyage and retaining the freight charges due from each appellee in accordance with the valid terms of the earned-freight clause. Accordingly, it is respectfully requested that the Decree and the judgment of the District Court, which are contrary to this position, be reversed in their entirety.

Respectfully submitted,

LILLICK, GEARY, OLSON & CHARLES,
IRA S. LILLICK
GILBERT C. WHEAT
EDWARD D. RANSOM
311 California Street,
San Francisco 4, California,
Attorneys and Proctors for Appellant

Dated: July 6, 1946

(Appendix Follows)

APPENDIX

Assignments of Error Relied Upon

II

The District Court erred in finding that on February 5, 1942, Respondent had sufficient facts upon which to base a determination to abandon the voyage and to justify an abandonment.

III

The District Court erred in failing to find that on February 5, 1942, Respondent had sufficient facts upon which to base a determination to abandon the voyage and to justify the abandonment.

IV

The District Court erred in finding that the lumber which remained on the docks for more than five (5) months after it was unloaded from the Absaroka did not sustain any damage or deterioration and further erred in failing to find that a large portion of said lumber cargo was oil-soaked as a result of the torpedoing.

XII

The District Court erred in failing to find and conclude that the following grounds or any of them constituted commercial frustration justifying Respondent's determination to abandon the voyage of the steamship Absaroka on February 5, 1942, and to find that all of such grounds existed:

(1) That at the time of Respondent's determination to abandon the voyage, there was a great peril from Japanese submarine activity and many vessels were being torpedoed on the West Coast;

(2) That at the time of Respondent's determination to abandon the voyage, it was reasonably anticipated that at the time repairs to the steamship Absaroka would be completed—such time being uncertain—there would be great peril from Japanese submarine activities on the West Coast of the United States;

(3) That at the time of Respondent's determination to abandon the voyage, there was an increase in the torpedoing of vessels on the East Coast of the United States and in the Caribbean Sea by reason of German submarine activity;

(4) That at the time of Respondent's determination to abandon the voyage, it was reasonably anticipated that at the time repairs to the steamship Absaroka would be completed—such time being uncertain—the torpedoing of vessels on the East Coast and in the Caribbean Sea by German submarine activity would not be diminished;

(5) That at the time of Respondent's determination to abandon the voyage, no intercoastal voyages were being undertaken, and that it could be reasonably anticipated that at the time the repairs to the steamship Absaroka would be completed—such time being uncertain—no intercoastal voyages would be undertaken;

(6) That at the time of Respondent's determination to abandon the voyage, it was impossible to predict the length of time required to complete repairs on the steamship Absaroka because of priority of Army, Navy, and War Shipping Administration vessels in obtaining repairs ahead of commercial vessels, such as the Absaroka;

(7) That at the time of Respondent's determination to abandon the voyage, there was a strong probability

that, on completion of the repairs to the steamship Absaroka, the vessel might be requisitioned by the Government for the uncertain duration of the war;

(8) That at the time of Respondent's determination to abandon the voyage, there was a strong probability that, at the time of completion of repairs to the steamship Absaroka, the vessel might be required by the Government to proceed in some direction other than intercoastal;

(9) That at the time of Respondent's determination to abandon the voyage, there was a strong probability that, at the time of completion of repairs to the steamship Absaroka, there would be no convoy available;

(10) That at the time of Respondent's determination to abandon the voyage, there was a strong probability that, at the time the repairs to the steamship Absaroka would be completed, the damage to the cargo by oil and salt water would be such as to make it worthless cargo;

(11) That at the time of Respondent's determination to abandon the voyage, there was insufficient labor available to properly pile the lumber to protect it from fire and deterioration, and it could be reasonably anticipated that such condition would continue;

(12) That at the time of Respondent's determination to abandon the voyage, the Respondent knew that, before the voyage could be resumed, there would be a long period of storage, and the costs of storage would be excessive;

(13) That at the time of the Respondent's determination to abandon the voyage, the United States Coast Guard required Respondent to employ watchmen to guard

and protect the lumber from fire resulting from the soaking of the lumber by oil, which costs would be excessive.

XIII

The District Court erred in failing to find that the factors enumerated in paragraph XII above did not exist at the time the contract to transport Libelant's lumber was made.

XIV

The District Court erred in finding and concluding that there was no commercial frustration of the voyage of the steamship Absaroka from St. Helens, Oregon, to Philadelphia, Pennsylvania, which justified the abandonment of the voyage at Los Angeles.

XVI

The District Court erred in finding and concluding that Respondent is not entitled to retain the freight on the lumber which remained on the vessel when the Absaroka was towed into San Pedro.